IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-307

JACK MOODY STRICKLIN, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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The Petitioner, JACK MOODY STRICKLIN, JR., respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 23, 1979.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western

District of Texas, El Paso Division, United States District Judge John H. Wood presiding, entered its *Order* on September 27, 1977, reproduced herein as Appendix A. This *Order* was made the subject of an Interlocutory Appeal under 28 U.S.C. 1291 to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reversed in part and affirmed in part on March 23, 1979. This opinion was reported as *United States v. Stricklin*, 591 F.2d 1112 (1979), and reproduced herein as Appendix B. The Court of Appeals subsequently denied Petitioner STRICKLIN's Petition for Rehearing on June 22, 1979. This result was reported as *United States v. Stricklin*, 598 F.2d 620 (1979), and reproduced herein as Appendix C.

JURISDICTION

The opinion of the Court of Appeals, holding that it lacked jurisdiction to consider that issue made the subject of this Petition. The Court of Appeals denied the Petition for Rehearing *En Banc* on June 22, 1979. This Petition was due to be filed in this Court on July 22, 1979, but was untimely filed after that date. In this regard, Petitioner moves this Court for permission to file his Petition for Certiorari out of time. For grounds, the Petitioner would show this Court that (1) his original retained Counsel died during the pendency of Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit; (2) the brother of the deceased Counsel assumed responsibility for the appeal and promised Petitioner that he would file a Petition for

Certiorari; (3) Petitioner was not informed as to the time limit under Supreme Court Rule 22; and (4) upon discovery that Petition was not timely filed, Petitioner discharged this Counsel and retained new Counsel who promptly prepared this Petition. In support of these facts, Petitioner has forwarded to this Court the affidavits of himself, former Counsel, and present Counsel, reproduced herein as Appendices D, E and F. Whereupon, the Petitioner prays that this Court consider his Petition, *Schacht v. United States*, 398 U.S. 58, 63-64 (1970); *Taglianetti v. United States*, 394 U.S. 316, n.1 (1969). Jurisdiction of this Court is invoked under the authority of the above cases, 28 U.S.C. §1254, and Supreme Court Rule 22.

QUESTION PRESENTED

Whether this Petitioner must undergo Indictment, bond, trial, possible conviction and possible confinement before he may seek Appellate review of his contention that the charges he is facing are identical with previous charges lodged against him in another District which were dismissed with prejudice because of Constitutional Speedy Trial violations.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

2. 28 U.S.C. §1291 provides in pertinent part:

> The Courts of Appeals shall have jurisdiction of Appeals from all final decisions of the District Courts of the United States, . . .

STATEMENT OF THE CASE

Commenting on this cause, the United States Court of Appeals for the Fifth Circuit observed that: "Close analysis of this case reveals that we are actually confronted with an unusual and complex blend of double jeopardy and speedy trial problems," *United States v. Stricklin*, 591 F.2d 1112, 1119-1120 (5th Cir. 1979). In order to insure against needless complexity or confusion, the Petitioner will set forth the underlying facts of this cause in chronological order, beginning with those events occurring before the instant prosecution and ending with the treatment of the issues on appeal by the Fifth Circuit.

A. The Tennessee Indictment.

This Petitioner was indicted in the United States District Court for the Middle District of Tennessee, Nashville Division, on August 23, 1973, (RI 66, et seq.). This two-count indictment charged that:

> From on or about December 1970, and continuously thereafter up to and including the date of the filing of this indictment, within the Middle District of Tennessee and elsewhere, THOMAS RAYBURN PITT, . . . JACK STRICKLAND, . . . DAVID BLOTT, MICHAEL HALLIDAY, . . . the defendants herein and others unknown to the grand jury, *unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate prior to May 1, 1971, Section 176(a) of Title 21, United States Code, and on and after May 1, 1971, to violate Sections 841(a)(1) and 846 of Title 21, United States Code.* (RI 66-67; Emphasis supplied)

and further charged;

> From on or about December 1970 and continuously thereafter up to and including the date of the filing of this indictment, within the Middle District of Tennessee and elsewhere, THOMAS RAYBURN PITT, . . . JACK STRICKLAND, . . . DAVID BLOTT, MICHAEL HALLIDAY, . . . the defendants herein and others unknown to the grand jury, knowingly and intentionally did unlawfully possess and distribute with intent to distribute a controlled substance, to wit, quantities of marihuana, a Schedule I non-narcotic controlled substance.
>
> Prior to May 1, 1971, in violation of Title 21,

> United States Code, Section 176(a) and Title 18, United States Code, Section 2, and on and after May 1, 1971, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. (RI 68)

Upon the District Court's order, the United States filed a Bill of Particulars which elaborated on the *locus criminis* of the indictment, "Tennessee and elsewhere," RI 54, to include "El Paso, Texas;

> Murfreesboro, Tennessee; Lebanon, Tennessee; Dickson, Tennessee; Atlanta, Georgia; Nashville, Tennessee; Toronto, Canada; Louisville, Kentucky; Knoxville, Tennessee; Winchester, Tennessee; Orlando, Florida; Cookeville, Tennessee; and Tucson, Arizona, . . ." *Sticklin, Supra.*, at 1115; RI 54, et seq.

B. The New Mexico Indictment.

During the pendency of the Tennessee indictment, the Government again indicted this Petitioner in New Mexico on August 29, 1974. This indictment charged that:

> On or about the 18th day of August, 1974, in the State and District of New Mexico, the defendants, JACK M. STRICKLIN, JR., . . . unlawfully, knowingly and intentionally did possess with intent to distribute a quantity of

> marihuana, a Schedule I controlled substance.
>
> In violation of 21 USC 841(a)(1), and 18 USC 2. (RI 77)

and further charged that:

> On or about August 18, 1974, in the State and District of New Mexico and elsewhere, JACK M. STRICKLIN, JR., . . . the defendants herein, wilfully and knowingly did combine, conspire, and confederate and agree together, and with each other, and with diverse other persons whose names are to the Grand Jury unknown, to possess with intent to distribute a quantity of marihuana, a Schedule I controlled substance, contrary to 21 USC 841(a) and in violation of 21 USC 841(a). (RI 77).

On March 14, 1975, the Petitioner was convicted on both counts of the New Mexico indictment, *Stricklin, Supra.*, at 1117. The Petitioner received a five year prison sentence which he began serving.

C. The Dismissal of the Tennessee Indictment.

On March 18, 1975, the Tennessee indictment was dismissed with prejudice by the District Court in Tennessee in a memorandum citing "the government's failure to grant Stricklin a speedy trial in accord

with his constitutional right under the Sixth Amendment." *Stricklin, Supra.*, at 1117. The Government declined to appeal this ruling which then became final.

D. The Texas Indictment.

While the Petitioner was serving the sentence resulting from the New Mexico indictment, he was indicted by the United States for the third time. This indictment, returned on June 16, 1977, charged:

> That beginning on or before September, 1971, and continuing until on or about June 24, 1976, in the Western District of Texas, the States of New Mexico, Georgia, and Tennessee, the Republic of Mexico, and divers other places to the grand jurors unknown, JACK MOODY STRICKLIN, JR., the Defendant herein, did combine, conspire, confederate and agree with David Blott, Ron Allen Chappell, Alberto Corral, Mike Haliday, Donald Johnson, Michael Joseph Loggins, Albert Wayne McClenney, Tim Melancon, George Murphy, Wanda J. Murphy, Thomas Rayburn Pitt, Thurman Wiley Rogers, and Arthur Neill Strickler named herein as coconspirators but not as defendants (and with other persons to the grand jurors unknown), unlawfully, wilfully and knowingly to import marijuana, (RI 4).

and further charged:

> That on or about July 18, 1972, in the Western District of Texas, Defendant JACK MOODY STRICKLIN, JR. did unlawfully, knowingly and intentionally import and cause to be imported a quantity of marijuana, a Schedule I controlled substance, into the United States from the Republic of Mexico, . . . (RI 5-6).

and further charged:

> That beginning on or before September, 1971, and continuing until on or about June 24, 1976, in the Western District of Texas, the states of New Mexico, Georgia, and Tennessee, the Republic of Mexico, and divers other places to the grand jurors unknown, JACK MOODY STRICKLIN, JR., the Defendant herein, did combine, conspire, confederate and agree with David Blott, Ron Allen Chappell, Alberto Corral, Mike Haliday, Donald Johnson, Michael Joseph Loggins, Albert Wayne McClenney, Tim Melancon, George Murphy, Wanda J. Murphy, Thomas Rayburn Pitt, Thurman Wiley Rogers, and Arthur Neill Strickler, named herein as coconspirators but not as defendants (and with other persons to the grand jurors unknown), unlawfully, wilfully and knowingly to possess marijuana, . . . (RI 6).

and further charged:

1. That on or about June 22, 1972, in the Western District of Texas, George Murphy (the said George Murphy being named as a principal but not as a defendant herein), did unlawfully knowingly and intentionally possess with intent to distribute a quantity of marijuana, . . .

2. That Defendant JACK MOODY STRICKLIN, JR., aided, abetted, counseled, induced and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2. (RI 7).

and further charged:

1. That on or about July 5, 1972, in the Western District of Texas, George Murphy (the said George Murphy being named as a principal but not as a defendant herein), did unlawfully, knowingly and intentionally possess with intent to distribute a quantity of marijuana, . . .

2. That Defendant JACK MOODY STRICKLIN, JR., aided, abetted, counseled, induced and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2. (RI 8-9).

and further charged:

1. That on or about July 18, 1972, in the Western District of Texas, Arthur Neill Strickler (the said Arthur Neill Strickler being named as a principal but not as a defendant herein), did unlawfully, knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. That Defendant JACK MOODY STRICKLIN, JR., aided, abetted, counseled, induced and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2. (RI 8).

and further charged:

That beginning on or before June 18, 1972, and continuing until on or about June 24, 1976, in the Western District of Texas; the District of New Mexico; the Republic of Mexico; Washington, District of Colombia; the State of North Carolina; the State of Georgia; the State of Minnesota; and other places to the grand jurors unknown, Defendant JACK MOODY STRICKLIN, JR. did unlawfully, wilfully and knowingly violate Title 21, United States Code, Sections 963, 846, and 841, as alleged in Counts One through Six of this Indictment, which is incorporated herein by reference, which violations were a part of a

> continuing series of violations of Subchapters I and II of the Comprehensive Drug Abuse Control Act of 1970, undertaken by Defendant in concert with at least five other persons with respect to whom the Defendant occupied a position of organizer, supervisor and manager, and from which continuing series of violations Defendant obtained substantial income and resources, through the aforesaid activity in the continuing criminal enterprise, . . . (RI 8-9).

The overt acts in the conspiracy counts of that indictment specifically recited the following occurrences:

> 8. On or about March, 1973, Donald Johnson flew an airplane containing a quantity of marijuana from the Republic of Mexico to an area near Magdalena, New Mexico.
>
> 9. On or about March, 1973, Defendant JACK MOODY STRICKLIN, JR., possessed with intent to distribute a quantity of marijuana near Magdalena, New Mexico.
>
> 10. On or about November, 1973, Defendant JACK MOODY STRICKLIN, JR., paid Donald Johnson approximately $40,000. (RI 5).

In this Petitioner's pre-trial Motions, Petitioner moved to dismiss the conspiracy, continuing enterprise, and substantive counts on the grounds that these

charges were barred by the dismissal with prejudice in Tennessee and by his conviction in New Mexico. The Petitioner essentially contended that his Texas charges were merely recombinations and reworkings of the conspiracies and substantive acts previously charged in New Mexico and Tennessee. After a pre-trial hearing at which the Petitioner introduced numerous documents and elicited testimony, the Government filed a superceding indictment. Immediately following this action, the District Court overruled all the Petitioner's Motions.

E. The Decision of the Fifth Circuit.

Regarding the superceding indictment, the Court of Appeals commented:

> The government's obtaining a new indictment subsequent to the hearing, which deletes all references to Don Johnson, Tim Melancon, and the Magdalena. New Mexico, episode is of no consequence to our finding, for as we pointed out earlier, the original indictment was never dismissed. In fact, the government's revision of the conspiracy counts may not bode well for their assertion that the conspiracies for which they seek to prosecute in the Texas indictment are clearly distinct from the conspiracies for which Stricklin has previously been indicted. *Stricklin, Supra.*, at 1122.

Regarding the conspiracy to import marijuana, the Court of Appeals affirmed the lower Court, noting that neither the Tennessee nor the New Mexico indictments dealt with an actual conspiracy to import, *Stricklin, Supra.*, at 1122.

Regarding the conspiracy to possess, the Court of Appeals noted that:

> At his double jeopardy hearing, Stricklin introduced material obtained in a Nevada trial under the Jenck's Act. This evidence tends to show that Stricklin entered into a conspiracy with Don Johnson and Tim Melancon, two of the conspirators named in the original Texas indictment, to import marijuana into the United States after the Tennessee conspiracy was terminated.[2] It appears from the evidence in the record that two loads of marijuana were flown to New Mexico from the Republic of Mexico by Don Johnson and Tim Melancon. The first load was apparently the load that was involved in those overt acts taking place in March and November of 1973, near Magdalena, New Mexico, and mentioned in both the conspiracy to import count and the conspiracy to possess with intent to distribute count of the original Texas indictment. The second load was seized in New Mexico on August 18, 1974, in Stricklin's possession; this indictment served as the basis of the New Mexico

> indictment and conviction. With regard to that portion of the original Texas indictment which Stricklin asserts refers to the New Mexico conspiracy to possess with intent to distribute for which he was previously convicted, Stricklin's burden of coming forth with a prima facie nonfrivolous double jeopardy claim is met. *Stricklin, Supra.*, at 1121-1122.

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[2] Stricklin asserts that the New Mexico conspiracy was a different conspiracy than the one with which he was charged in Tennessee. Even if the New Mexico conspiracy had been a continuation of the Tennessee conspiracy, further operation of the "old" conspiracy after being charged with that crime becomes a new offense for purposes of a double jeopardy claim.

The Court then remanded this matter for further hearings so that the proper standards, *United States v. Inmon*, 568 F.2d 326 (3rd Cir. 1977), could be applied, *Stricklin, Supra.*, 1124-1125.

As to the continuing criminal enterprise charges, the Court of Appeals made a similar disposition, *Stricklin, Supra.*, at 1124, again utilizing the New Mexico indictment. However, the Court refused to consider the effect of the Tennessee indictment on the various charges, reasoning that no jeopardy was attached and holding that the Court of Appeals had no jurisdiction to consider the matter in a pre-trial appeal. Specifically the Court held:

> We do not reach the question of whether

> the Texas indictment is barred under the Sixth Amendment by virtue of charging Stricklin with the same crime as charged in the dismissed Tennessee indictment. While *Abney* establishes that the denial of a double jeopardy claim is a final and appealable decision within the meaning of 28 U.S.C. §1291, there is no comparable jurisdictional basis on which to exercise pre-trial review of an indictment which is potentially barred by Sixth Amendment speedy trial considerations. *Stricklin, Supra.*, at 1120.

and concluded:

> . . . for us to expand appellate jurisdiction to include the situation where the dismissed indictment is claimed to bar a subsequent indictment on speedy trial grounds would be unwarranted. *Stricklin, Supra.*, at 1121.

The Court of Appeals thus asserted a lack of jurisdiction to consider a pre-trial appeal of those issues posed by the Tennessee indictment, and it is this specific holding that the Petitioner questions in this Petition for Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

Whether This Petitioner Must Undergo Indictment, Bond, Trial, Possible Conviction And Possible Confinement Before He May Seek Appellate Review Of His Contention That The Charges He Is Facing Are Identical With Previous Charges Lodged Against Him In Another District Which Were Dismissed With Prejudice Because Of Constitutional Speedy Trial Violations.

Before submitting his reasons justifying Certiorari, the Petitioner would briefly summarize the facts and issues involved in the above question, together with the position he will argue. As related *supra.*, the Petitioner's indictment in Tennessee ended with a dismissal with prejudice on Constitutional speedy trial grounds. The United States failed to appeal and thus the decision became final. When the Petitioner was indicted in Texas, he submitted evidence of this prior Tennessee dismissal together with his prior New Mexico convictions and contended that the Texas charges were simply reiterations and combinations of the Tennessee and New Mexico charges and thus were barred. After the District Court ruled against the Petitioner, he perfected a pre-trial appeal to the Court of Appeals, At that level, the Court of Appeals held it had jurisdiction to consider that part of his appeal regarding the Petitioner's New Mexico convictions since it involved a double jeopardy issue, but the Court further held that it did not have jurisdiction to consider that part of the Petitioner's appeal dealing with his Tennessee dismissal because it was a speedy trial issue. It is the Petitioner's position that a Court of Appeals

does have jurisdiction to entertain pre-trial appeals of that category of speedy trial matters which: (1) involve a dismissal with prejudice on Constitutional speedy trial grounds which has become final through appeal or lack of appeal; and (2) involve a Court proceeding which is collateral in the same sense that a prior jeopardy proceeding is collateral.

A. This is an Important Question Involving the Jurisdiction of the Federal Courts.

The holding of the Fifth Circuit outlined above is a case of first impression. No other Circuit Court has dealt with this specific problem, neither has this Court. The Fifth Circuit cited this Court's opinion in *United States v. MacDonald*, 435 U.S. 850 (1978), as controlling authority, but the precise issue treated in *MacDonald* was only:

> This case presents the issue whether a defendant, *before* trial, may appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial.[1] (Footnote Omitted) *United States v. MacDonald*, 435 U.S. 850 (1978). (Emphasis in original)

The Supreme Court held that jurisdiction to consider the issue above was not conferred by 28 U.S.C. 1291. The Fifth Circuit read this opinion as holding that no

pre-trial jurisdiction existed for any speedy trial issue, regardless of how final or how collateral to the cause awaiting trial. This Petitioner argues that this holding is an unwarranted extension, indeed an actual misapplication of *MacDonald*, and that a religious application of the reasoning set forth by Justice Blackmum in *MacDonald* would compell a contrary result. The Petitioner considers this misapplication and misconstruction of *MacDonald* to be his major rationale for requesting Certiorari,[1] and will treat this subject separately, *infra*.

In any case, there can be no argument as to the importance of the issue. This cause involves an issue of Federal Jurisdiction. The Jurisdiction of the Federal Courts has historically been an issue of great interest to this Court, and this interest has often resulted in this Court granting Certiorari.[2]

Additionally, the particular area of jurisdiction involved here is important in itself because it is certain to loom even larger in the future. The sanctions of the speedy trial act of 1974, 18 U.S.C. §§3161-3174 (1976), have now come in effect. Since the standards for demonstrating a violation under this act are much less rigorous than those standards required to demonstrate Constitutional violations, it is not a flight of fantasy to presuppose that in the future a greater number of these violations will be established and sanctions granted. The sanction of dismissal with prejudice is the

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1 *Wilkinson v. United States*, 365 U.S. 399 (1961); *Schlude v. Commissioner*, 372 U.S. 128 (1963).

2 *Abney v. United States*, 431 U.S. 651, 653 (1977); *United States v. MacDonald*, 435 U.S. 850, 854 (1978).

prescribed remedy for serious statutory violations, *Steinberg*, 68 J. Crim. L.C. § P.S. 1 (1977), as it has been the required remedy for Constitutional violations, *Stricklin, Supra.*, at 1120; *Mann v. United States*, 113 U.S. App. D.C. 27, 30, 304 F.2d 394, 397, cert. denied, 371 U.S. 896 (1972). However, if this case is any example, the Government will show no reluctance in attempting to nullify this remedy by the simple procedure of reindicting in a friendlier forum, in another district, in another division or in another Court within the division. Thus, the question facing this Petitioner, whether a Defendant who has proven his speedy trial claim and received a remedy fashioned by the Court must wait through trial and possible post-trial confinement to seek Appellate enforcement of that remedy, is a question which other Defendants will face in increasing numbers. The Fifth Circuit's jurisdictional holding in *Stricklin* would convert the remedy of dismissal with prejudice to a mere right to have an Appellate Court hold some time later that the Appellant should not have been indicted, required to made bond, tried, convicted, or imprisoned. It is this question of Federal Jurisdiction that the Petitioner asks this Court to consider.

B. *The Fifth Circuit's Holding in* Stricklin *misapplied and misconstrued the reasoning of this Court in* MacDonald.

The Fifth Circuit pointedly cited *MacDonald* as the primary authority supporting its holding that it has no jurisdiction:

> We do not reach the question of whether the Texas indictment is barred under the Sixth Amendment by virtue of charging Stricklin with the same crime as charged in the dismissed Tennessee indictment. While *Abney* establishes that the denial of a double jeopardy claim is a final and appealable decision within the meaning of 28 U.S.C. §1291, there is no comparable jurisdictional basis on which to exercise pre-trial review of an indictment which is potentially barred by Sixth Amendment speedy trial considerations. The Supreme Court recently held in *United States v. MacDonald*, (Citation Omitted), that a defendant may not, *before* trial, appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial. (Citations Omitted.) Stricklin's situation is different from that found in *MacDonald* since the possible violation of his rights lies in his being reindicted on the same charges which were the subject of an indictment already dismissed on speedy trial grounds rather than in his being brought to trial on the first indictment, as in *MacDonald*. The basic consideration in both cases, however, is whether the defendants' speedy trial rights will be violated by the impending prosecutions, and for us to expand appellate jurisdiction to include the situation where the dis-

> missed indictment is claimed to bar a subsequent indictment on speedy trial grounds would be unwarranted. *Stricklin, Supra.*, at 1120-1121.

Thus, the Fifth Circuit held that *MacDonald* stands for the proposition that no speedy trial issue, however final or collateral, can be the subject of a pre-trial appeal. It is the Petitioner's contention that if the reasoning set forth in *MacDonald* were faithfully applied to *Stricklin*, a contrary result would be required.

In *MacDonald*, Justice Blackmum, writing for a unanimous Court, set forth several legal and practical considerations as the bases for the Court's holding that a denial of a claim of a speedy trial violation could not be appealed before trial under 28 U.S.C. §1291. Looking at these considerations, we find the following:

1. FINALITY.

This Court in *MacDonald* first considered the finality of the decision:

> The application to the instant case of the principles enunciated in the above precedents is straightforward. (Footnote Omitted) Like the (435 U.S. 857) denial of a motion to dismiss an indictment on double jeopardy grounds, a pre-trial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review," *Abney v. United States*, 431 U.S., at 659, 52 L.Ed.2d 651, 97 S.Ct. 2034, that is, such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court. *MacDonald, Supra.*, at 856-857.

Having found that a speedy trial issue, like a double jeopardy issue, lacks *traditional* finality, the Court then turned to the standards set forth in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545-547 (1949) respecting the collateral order exception to the finality rule.

2. A COMPLETE AND FINAL REJECTION OF THE DEFENDANT'S CLAIM IN THE TRIAL COURT.

This Court held that a denial of a speedy trial claim before trial was not a final rejection by the trial Court because the question remains "open," "unfinished" and "inconclusive" until final judgment, *MacDonald, Supra.*, at 859. However, this Court in *Abney* held that a denial of a double jeopardy claim before trial was a final rejection of the Defendant's claim in the trial Court, *Abney, Supra.*, at 659. In much the same manner, the trial Court's rejection of the Petitioner's claim that his Tennessee dismissal barred his subsequent indictment and trial in Texas was a final rejection. The Petitioner is in the same position as the Defendant urging a double jeopardy bar in *Abney*, "there are simply no further steps that can be taken in the District Court to avoid the trial the Defendant maintains is barred . . . ," *Abney, Supra.*, at 559.

3. COLLATERALNESS OF THE ORDER.

This Court further reasoned that a denial of a speedy trial claim before trial would not meet the requirement that the Order sought to be appealed from be "collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged," *MacDonald, Supra.*, at 851 quoting *Abney, Supra.*, at 659. However, like the double jeopardy claim in *Abney*, the claim of this Petitioner, i.e., that a prior dismissal with prejudice on Constitutional speedy trial grounds bars his reindictment and trial on the same offenses, is a matter collateral and separate from the trial he is now facing. No one can argue with the fact that the Petitioner's speedy trial claim has been successfully litigated in a separate proceeding in Tennessee. The only remaining question is whether the Texas charges are the same as the Tennessee charges. That question is the identical question that would be present in any double jeopardy claim. Thus, the two issues stand on the same footing.

In *MacDonald*, this Court reasoned a denial of a speedy trial claim did not result in a loss of any right since the Speedy Trial Clause did not vest a Defendant with the right not to be tried, *MacDonald, Supra.*, at 860-862. The Petitioner would argue that when a Defendant successfully establishes his speedy trial claim and a Court fashions his remedy, i.e., a dismissal with prejudice, he then has a right not to be tried on that offense. Indeed, as this Court pointed out, "Of course, an accused who does successfully establish a speedy trial claim before trial will not be tried," *MacDonald, Supra.*, at 861, n.8. Should the Government's maneuver in *Stricklin* be upheld, and his right to appeal denied, then the "of course" confidence expressed by this Court in *MacDonald* would seem to be unsupported by reality.

4. *PRACTICAL CONSIDERATIONS.*

After applying the *Cohen* standards to pre-trial denials of speedy trial claims, this Court turned to policy considerations in not allowing pre-trial appeals of these matters. The Court reasoned that:

> Unlike a double jeopardy claim, which requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense, ... Thus, any defendant can make a pretrial motion (435 U.S. 863) for dismissal on speedy trial grounds and, . . . could immediately appeal its denial. *MacDonald, Supra.*, at 862-863.

This Petitioner's claim that his Texas prosecution was barred by his Tennessee dismissal could not be made by just any Defendant. There would be no deluge upon the Federal Courts of Appeal. Similar to a double jeopardy claim, this claim would require a "colorable showing" that he had been granted a dismissal with prejudice "on the same or a related offense," *MacDonald, Supra.*, at 862. Thus, under this analysis as under

the analyses previously considered, the Petitioner's claim that his present prosecution is barred by the previous dismissal stands on the same footing as a double jeopardy claim. Therefore, it should be treated the same in so far as Appellate Jurisdiction is concerned.

CONCLUSION AND PRAYER

The question presented herein is a clear, crisp and definite legal issue uncluttered by disputed facts or ambiguous positions. It is an issue dealing with jurisdiction of the Federal Courts in the area of Constitutional and statutory speedy trial guarantees because the Speedy Trial Act of 1974 has "come into its own," the impact of this Court deciding this issue or failing to decide this issue will be great. If the decision of the United States Court of Appeals for the Fifth Circuit is allowed to remain the law within that Circuit, Defendants such as this Petitioner will gain precious little from successfully prosecuting their speedy trial claims in one District because the United States will be able to respond by putting them to trial in another District. Of course, after reindictment, bond, possible conviction, and possible incarceration, the Defendants will have the right to be heard by a Federal Appellate Court. And when that Court's opinion is delivered some time later, the Defendant's right to remedy fashioned by the first District Court, the right not to be re-indicted, bonded, convicted, or imprisoned will be vindicated. Or will it? Because of the merits of this case and because of the importance of the Federal Jurisdictional question involved, the Petitioner prays that this Court grant a Petition of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, JACK MOODY STRICKLIN, JR., hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Jamie Boyd
United States Attorney
U.S. Attorney's Office
655 E. Durango Blvd.
Hemisfair Plaza
San Antonio, Texas 78206

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said Jamie Boyd, attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this ____ day of August, 1979.

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APPENDIX "A"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA

versus No. EP-77-CR-160

JACK MOODY STRICKLIN, JR.

ORDER

Came on this date to be considered Defendant's claim of former jeopardy. This Order is based on the evidence obtained at the hearing of August 31, 1977, the brief filed by Defendant, and the response of the United States of America.

Defendant contends that because he was previously indicted in the Middle District of Tennessee, and prosecuted in the District of New Mexico, the Government is now precluded from prosecuting the indictment pending in the Western District of Texas. At most, Defendant's contention pertains to the conspiracy charges and the continuing criminal enterprise charge pending in this District. See *Jeffers v. United States*, 97 S.Ct. 2207 (1977). The four remaining substantive counts pertain to unlawful importation and possession with intent to distribute marijuana within the Western District of Texas.

Defendant admits that he was involved in at least two narcotic conspiracies during the period covered by the conspiracy charged in the Western District of Texas. A comparison of the superseding indictment charging conspiracies in this District, with the indictments in Tennessee and New Mexico reflects that each alleges different transactions and different overt acts. Except for Defendant, there are no common coconspirators. Clearly, the evidence to sustain each indictment would, of necessity, be different. *United States v. Pape*, 553 F.2d 815 (2nd Cir. 1976), *cert. denied*, ____ U.S. ____; *United States v. Bommarito*, 524 F.2d 140 (2nd Cir. 1975).

A review of the record of the hearing conducted, August 31, 1977, reflects that Defendant was charged with conspiracy to possess with intent to distribute marijuana, and possessing with intent to distribute marijuana on or about August 18, 1974, in the District of New Mexico. Defendant was convicted after a trial in New Mexico and, accordingly, has been placed in jeopardy in connection with that case. The case in the United States District Court for the Middle District of Tennessee was dismissed for lack of speedy trial and Defendant was never placed in jeopardy.

Defendant contends that if the Government could have proceeded against him either in Tennessee or New Mexico for a continuing criminal enterprise, it is precluded from doing so at this juncture. In order to sustain a conviction for violating Section 848, the

Government must prove (1) that Defendant was involved in a continuing series of federal narcotics law violations, (2) that he acted in concert with five or more persons, (3) that he occupied the position of organizer or supervisor with respect to five or more persons, and (4) that he obtained substantial income or resources from the continuing series of such violations. *United States v. Bolts*, No. 76-4253, (5th Cir., August 29, 1977).

The Supreme Court has stated recently that an exception to the prohibition against a subsequent prosecution for a greater offense may exist where the state was unable to proceed because the additional facts necessary to sustain that charge had not occurred at the time of the earlier prosecution, or had not been discovered despite the exercise of due diligence. *Jeffers v. United States, supra; Brown v. Ohio*, 53 L.Ed.2d 187, 196, n.7 (1977).

At the hearing, August 31, 1977, the Government called as witnesses Mr. Irving H. Kilcrease, Jr., Assistant United States Attorney, Middle District of Tennessee, and Mr. Harris Hartz, former Assistant United States Attorney for the District of New Mexico. The undisputed testimony of both prosecutors is that the Government did not have sufficient proof in either case to sustain a conviction for a violation of Section 848.

It is apparent from the testimony obtained at the hearing that the Government was unable to prosecute

the Defendant for the charges contained in the indictment in the Middle District of Tennessee. Consequently, there is no basis for concluding that the Government could have indicted or successfully prosecuted Defendant for a greater offense. The testimony of Mr. Hartz with respect to the New Mexico case indicates that all the evidence known at the time of the prosecution was utilized and, due to the absence of cooperation from any of the defendants, no additional evidence was obtained. A review of the transcript of the trial in New Mexico reflects that the elements of Section 848 could not have been proven. In fact, the total evidence available to the New Mexico and Tennessee federal prosecutors would have been insufficient to support a Section 848 conviction.

It is well settled that a conspiracy to violate a law is a separate offense from the substantive violation. *Calaman v. United States*, 364 U.S. 587 (1961), *Mathews v. United States*, 407 F.2d 1371 (5th Cir. 1969), *cert. denied*, 398 U.S. 968 (1970). Further, a conviction for one narcotics conspiracy does not bar prosecution for another narcotics conspiracy. *United States v. Croucher*, 532 F.2d 1042 (5th Cir. 1976). Several conspiracies can exist during the same time period. *United States v. Pape, supra.*

The effect of Defendant's motion is to request pretrial discovery of Jencks Act statements and internal Government files. At the hearing, Defendant requested all files concerning him, as well as all coconspirators in the Tennessee case. If the Court were to grant

Defendant's request, such a disclosure would necessitate revealing existing investigations about individuals who are not currently indicted. It would not be in the public interest for the Government to publicly reveal the results of investigations concerning other violations by Defendant, if any, or with respect to individuals who are not currently indicted.

At the hearing the Court offered to review *in camera* the entire Government's file in order to determine whether there is any basis for concluding that the conspiracies charged in the Western District of Texas constitute a second prosecution of the New Mexico or Tennessee cases. This procedure was objected to by Defendant, who requested direct production of the Government files. This conduct suggests to the Court that Defendant is not making a good faith claim concerning former jeopardy, but that he is more interested in determining the extent of the Government's evidence against him, as well as evidence against other individuals who are not currently indicted.

Defendant is attempting to obtain pretrial discovery of evidence normally not discoverable prior to trial through *Brady v. Maryland*, 373 U.S. 83 (1963). However, *Brady* requires production of evidence favorable to a defendant which is " . . . material either to guilt or to punishment." *Moore v. Illinois*, 408 U.S. 786, 794 (1972). The *Brady* disclosures are not required to be made prior to trial. *United States ex rel Lucas v. Regan*, 503 F.2d 1 (2nd Cir. 1974), *cert. denied* 420 U.S. 939. Further, *Brady* does

not expand the pretrial discovery available pursuant to Rule 16, Federal Rules of Criminal Procedure. *United States v. Ramirez*, 506 F.2d 742 (5th Cir. 1975); 18 U.S.C. §3500. The claim of former jeopardy in this case is not sufficient to permit it to be utilized as a vehicle by which Defendant can obtain Jencks Act statements prior to trial or other discovery to which he is not entitled.

Even if this Court were to find former jeopardy with respect to the conspiracy counts or the continuing criminal enterprise charge, the four remaining substantive counts would still have to be tried. There is no evidence that the New Mexico or Tennessee grand juries intended to cover substantive violations in other jurisdictions, or that they would have any authority to do so.

A review of the record reflects that Defendant appeared before the federal grand jury for the El Paso Division of the Western District of Texas, March 22, 1977. At that time, he was represented by the same attorney who is representing him in this proceeding. Defendant was indicted June 16, 1977, and was arraigned in the United States District Court, June 23, 1977. Defendant filed no motions in this case until on or about August 18, 1977, a few days prior to the call of the docket. Defendant's motions are therefore untimely. Since Defendant opposes an *in camera* inspection of the Government's file, the Court will, in the interest of justice, permit Defendant to reurge his

claim of former jeopardy during the trial on the basis of the evidence which is introduced.

It is therefore, ORDERED, ADJUDGED, and DECREED that Defendant's Motions are untimely and without merit and are in all things DENIED. It is further ORDERED that, in the interest of justice, Defendant may reurge the claim of former jeopardy during the trial.

/s/ John H. Wood Jr.
JOHN H. WOOD JR.
UNITED STATES
DISTRICT JUDGE

Filed: 9-27-77

DAN W. BENEDICT, Clerk

/s/ GJS
Deputy

APPENDIX "B"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK MOODY STRICKLIN, JR.,
Defendant-Appellant.

No. 77-3072

United States Court of Appeal,
Fifth Circuit.

March 23, 1979

Appeal from the United States District Court for the Western District of Texas.

Before COLEMAN, GEE and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

This is an appeal by Jack Moody Stricklin, Jr., from the District Court's denial of his motion to dismiss an indictment handed down in El Paso, Texas, on double jeopardy grounds. The pretrial order rejecting Stricklin's claim that two previous indictments handed down in Tennessee and New Mexico resulted in former jeopardy is properly before us as a final decision within the meaning of 28 U.S.C. §1291. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The

issue in this case is whether the District Court correctly denied Stricklin's motion to dismiss. We affirm the District Court with respect to the substantive charges of importing and of aiding and abetting, as well as the importation conspiracy charge, but reverse and remand on the possession with intent to distribute conspiracy charge and the continuing criminal enterprise charge so that the District Court can rehear that part of the motion and apply the procedural standards set forth below.

I. The Indictments

The Tennessee indictment was returned against Stricklin on August 23, 1973. The District Court's order that the government supplement the indictment with a bill of particulars was complied with on January 21, 1975. The government charged that Stricklin conspired with thirty-nine co-defendants and others whose names were unknown to distribute and possess with intent to distribute marijuana, a schedule I nonnarcotic controlled substance, in violation of 21 U.S.C. §§841(a)(1) and 846 and the predecessor of those statutes, 21 U.S.C. §176a. It was also charged that the defendants and unknown coconspirators did unlawfully possess with intent to distribute and distribute marijuana in violation of first 21 U.S.C. §176a and 18 U.S.C. §2 and then 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. The indictment charged that the conspiracy continued from on or about December, 1970, to August 23, 1973. The bill of particulars recited overt acts in El Paso, Texas; Murfreesboro, Tennessee; Lebanon,

Tennessee; Dickson, Tennessee; Atlanta, Georgia; Nashville, Tennessee; Toronto, Canada; Louisville, Kentucky; Knoxville, Tennessee; Winchester, Tennessee; Orlando, Florida; Cookeville, Tennessee; and Tucson, Arizona, between May, 1971, and May, 1973.

The New Mexico indictment was returned against Stricklin on August 29, 1974. This indictment charged that Stricklin conspired with five codefendants and others whose names were unknown to possess with intent to distribute marijuana, in violation of 21 U.S.C. §841(a). They were also charged with unlawful possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. The indictment charged that the conspiracy took place on or about August 18, 1974, in the State and District of New Mexico, and elsewhere. The possession was alleged to have occurred on or about August 18, 1974, in New Mexico.

The original Texas indictment was returned against Stricklin on June 16, 1977, and a superceding indictment was returned on September 15, 1977[1]. The original indictment charged that Stricklin: (1) conspired with thirteen coconspirators and others whose names were unknown to import marijuana in violation of 21 U.S.C. §§952(a) and 963; (2) did import and cause to be imported marijuana in violation of 21 U.S.C. §§960(a)(1) and 952(a); (3) conspired with thirteen coconspirators and others whose names were unknown to possess with intent to distribute marijuana in violation of 21 U.S.C. §§841(a)(1) and 846; (4) aided and abetted two individuals (named as coconspirators) on three separate occasions in their unlawful possession of marijuana in violation of 21 U.S.C. §841(a)(1) and thus violated 18 U.S.C. §2; and (5) engaged in a continuing criminal enterprise by virtue of his marijuana transactions and thus violated 21 U.S.C. §848. The importation conspiracy was alleged to have continued from on or before September, 1971, to on or about June 24, 1976, in the Western District of Texas, the States of

1 A superceding indictment may be returned at any time before a trial on the merits. *United States v. Herbst*, 565 F.2d 638, 643 (10th Cir. 1977); *United States v. Millet*, 559 F.2d 253, 257-58 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 759 (1978); *United States v. White*, 524 F.2d 1249, 1253 (5th Cir. 1975), cert. denied, 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375 (1976). Indeed, two indictments may be outstanding at the same time for the same offense if jeopardy has not attached to the first indictment. *United States v. Cerilli*, 558 F.2d 697, 700 (3d Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 507 (1977); *United States v. Holm*, 550 F.2d 568, 569 (9th Cir.), *cert. denied*, 434 U.S. 856, 98 S.Ct. 176, 54 L.Ed.2d 127 (1977); *United States v. Grady*, 554 F.2d 598, 602 n. 4 (2d Cir. 1976); *DeMarrias v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980, 94 S.Ct. 1570, 39 L.Ed.2d 877 (1974); *United States v. Garcia*, 412 F.2d 999, 1000 (10th Cir. 1969). Since the original indictment apparently was never dismissed, there are technically two pending indictments against Stricklin, and it appears that the government may select one of them with which to proceed to trial. *United States v. Cerilli*, 558 F.2d at 700 n. 3. The superceding indictment was not filed until after the pretrial double jeopardy hearing, so that Stricklin's argument at the hearing was concerned with the original indictment. The District Court, however, referred only to the superceding indictment's conspiracy charges in its order denying Stricklin's motion. At oral argument, the government indicated that it may attempt to proceed on a combination of the two indictments because the superceding indictment deals only with a portion of the original indictment's charges. Hence, we will consider both indictments for purposes of this review.

New Mexico, Georgia, and Tennessee, the Republic of Mexico, and other places unknown to the grand jury. This conspiracy count recited fourteen overt acts in El Paso, Texas; Carlsbad, New Mexico; the Republic of Mexico; Magdalena, New Mexico; and the Western District of Texas, between September, 1971, and November, 1973. The substantive importation count alleged the Western District of Texas as the *locus criminis* and July 18, 1972, as the approximate time that the offense occurred. The possession conspiracy was alleged to have taken place during the same time frame and in the same locations as the importation conspiracy. The twelve overt acts recited in support of the possession conspiracy were identical to twelve of the overt acts recited in the importation conspiracy count and thus covered the same time frame and area as did that count. The three aiding and abetting violations were alleged to have taken place in the Western District of Texas on June 22, 1972; July 5, 1972; and July 18, 1972. The original indictment lastly charged Stricklin with operating a continuing criminal enterprise by virtue of his status in the marijuana transactions recited in the previous counts; this enterprise was alleged to have operated from on or before June 18, 1972, until on or about June 24, 1976, in the Western District of Texas, the Republic of New Mexico, the District of Columbia, New Mexico, North Carolina, Georgia, Minnesota, and other places unknown to the grand jury.

The superceding indictment was not prepared and filed until *after* the double jeopardy hearing where Stricklin had pointed out the apparent overlaps

between the New Mexico indictment and the then pending Texas indictment. The superceding indictment charged Stricklin with essentially the same importation and possession conspiracies as charged in the original indictment, except that the names of five co-conspirators were deleted and the reference to Tennessee as one of the locations for the conspiracies was omitted. Five overt acts were also eliminated from each conspiracy count, shortening the time span for the acts supporting the importation conspiracy to on or about December, 1971, to November, 1972, and for the acts supporting the possession conspiracy to on or about December, 1971, to October, 1972. The omission of these acts also deleted the references to Magdalena, New Mexico, one of the references to El Paso, Texas, and the references to two of the originally named co-conspirators who were not included in the charging portions of the superceding indictment. Basically, the government simply carved out and discarded those specific references to those specific overlaps.

The Tennessee indictment was dismissed with prejudice on March 18, 1975, because of the government's failure to grant Stricklin a speedy trial in accord with his constitutional right under the Sixth Amendment. The New Mexico indictment resulted in a conviction on both counts on March 14, 1975, and Stricklin received a five year prison sentence. The Texas indictment was returned on June 16, 1977. On August 17, and 26, 1977, Stricklin moved before the District Court to dismiss the Texas indictment on the grounds

that the Tennessee indictment, which was dismissed with prejudice, and the New Mexico indictment, which resulted in his conviction, had placed him in former jeopardy. A pretrial double jeopardy hearing took place on August 31, 1977; the government filed the superceding indictment on September 15, 1977; and the District Court issued an order denying Stricklin's motion on September 27, 1977. The District Court found that four substantive counts pertaining to unlawful importation and possession with intent to distribute marijuana within the Western District of Texas presented no possible double jeopardy problem. With regard to the two conspiracy counts, the District Court found that a comparison of the Tennessee and New Mexico indictments with the superceding indictment in Texas, in light of the evidence obtained at the hearing, reflects that each alleges different transactions and overt acts and that, in any event, jeopardy had never attached in the Tennessee case. Concerning the continuing criminal enterprise count, the District Court found that the government did not have sufficient proof in either the Tennessee or New Mexico conspiracy case to sustain a conviction for a violation of 21 U.S.C. §848, so that there was no double jeopardy bar to this subsequent prosecution for the greater offense. This appeal followed.

II. The Application of Abney

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), held that the denial of a motion to

dismiss an indictment on double jeopardy grounds results in an appealable final order. Thus, the double jeopardy issue may be decided and appealed *before* a record of the trial on the challenged indictment is made. *Abney* may be applied without serious complexity where the indictments and the record from the previous trial are sufficiently explicit to provide for clear-cut determination of the double jeopardy claim. For example, where X is once indicted and tried for the murder of Y, a subsequent indictment charging that X murdered Y would clearly violate X's Fifth Amendment right not to be twice put in jeopardy for the same offense. Where, however, the charges in two or more indictments involve crimes such as complicated or far-reaching conspiracies, as in this case, the application of *Abney* can be troublesome, especially when one of the previous indictments did not result in a trial and the creation of a record. It is necessary, then, to establish procedural rules for an *Abney* pretrial double jeopardy hearing, so that requirements such as going forward with proof, burden of persuasion, and weight of the evidence are equitably assigned to and understood by the parties. The Third Circuit was recently confronted with an identical task in *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1977). We adopt their well-reasoned opinion in that case as the law in this Circuit, along with such modifications and additions as our comments may provide.

It is undisputed that the burden of going forward by putting the double jeopardy claim in issue is and should

be on the defendant. It is similarly reasonable to require the defendant to tender a prima facie nonfrivolous double jeopardy claim before the possibility of a shift of the burden of persuasion to the government comes into play. Once the defendant has come forward with such a prima facie nonfrivolous claim, however, we are faced with determining whether the defendant or the government should carry the burden of persuasion from that point forward. The Third Circuit in *Inmon* concluded that the burden should then be placed on the government, basing its decision on practical considerations concerning access to proof and on the government's control over the particularity with which indictments are drafted. 538 F.2d at 329-32. *Accord, United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 955, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975). We agree, for similar reasons, that the burden of establishing that the indictments charge separate crimes is most equitably placed on the government when a defendant has made a nonfrivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy.

The defendant might make the necessary prima facie nonfrivolous showing of double jeopardy by reference to the indictments, as supplemented by a bill of particulars if appropriate and ordered, and other record material, alone. He might find it necessary to offer his own testimony at the pretrial hearing. If the latter course is followed, the defendant will not thereby waive the privilege against self-incrimination and his

testimony may not subsequently be used against him at the trial on the merits. In *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the Supreme Court held that a defendant may testify in a pretrial suppression hearing directed at vindication of Fourth Amendment rights without fear that his testimony will be used against him at the subsequent trial. The Supreme Court reasoned that any other rule would inhibit defendants from asserting Fourth Amendment claims and would require that one constitutional right be surrendered in order to assert another. 390 U.S. at 392-94, 88 S.Ct. 967. We agree with the *Inmon* Court that the reasoning in *Simmons* is also controlling in a pretrial double jeopardy hearing.

Other evidence normally available to the defendant at the pretrial stage may, of course, also be offered in his attempt to make a prima facie showing of former jeopardy, but our resolution of *Abney's* procedural problems in no way expands or alters the discovery now available to defendants. Material which is presently unavailable to the defendant through discovery or any other means is not made more accessible by our holding in this case.

The impracticality of placing the burden of persuasion on the defendant in this situation is obvious in light of his lack of access to the proof on which the government proposes to rely and his inability to offer immunity to prospective witnesses. *See United States v. Herman,* 589 F.2d 1191 (3d Cir.) (1978); *United States v. In-*

mon, 568 F.2d at 329-30; *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied*, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975); *United States v. Smith*, 436 F.2d 787, 790 (5th Cir.), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971). Where a prior indictment resulted in a guilty plea or was dismissed, so that there is no record of the evidence supporting the prior indictment, the defendant is even further handicapped. The government is clearly in a better position to show that the crime charged in the present indictment is not the same as one charged in a previous indictment than the defendant is to show that the crimes are the same.

The government's responsibility for securing an indictment which is sufficiently detailed to inform the defendant of the charges against him and to allow him later to claim the defense of double jeopardy if he be again charged with that crime further justifies placing the burden of persuasion on the government. See *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Traditionally, courts have been understandably reluctant to interfere and require more particularity on potential double jeopardy grounds; it is a most difficult task to look ahead down the road and predict what future crimes may be charged by a subsequent indictment. Since the government controls the particularity of an indictment, it should bear the responsibility for any ambiguities resulting in its vagueness that are left unresolved by a bill of particulars. The government may be said to make the following representation to the court when it proceeds

on an indictment: "This indictment is sufficient. If the defendant is hereafter charged on another indictment and it appears prima facie that this indictment has already charged him with that offense, then we accept the burden of showing that the new charge is different." From the government's point of view, its interests are also served by securing detailed indictments because a meritless claim of double jeopardy in a subsequent case will be easier to refute. We hope that the salutary effect of our assigning the burden as we do will be more carefully drawn indictments, especially in conspiracy cases where the tendency is to use all-encompassing, vague language.

Once the burden of persuasion has shifted to the government by virtue of the defendant's presentation of a prima facie nonfrivolous claim of prior jeopardy, the government is not compelled to come forward with any particular kind of evidence. It may present however much or little evidence as it deems advisable, subject, of course to dismissal of the indictment if not enough evidence to rebut the defendant's prima facie showing is introduced. The weight of the evidence by which the government must demonstrate that two separate crimes are charged is a preponderance of the evidence. Again, our conclusion comports with that of the Third Circuit in *Inmon*, wherein they point out that the Fifth Amendment double jeopardy privilege is personal and waivable and not an element of the crime, so that a heavier evidentiary burden is, by implication, not constitutionally required by *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (voluntari-

ness of confession may be determined by preponderance of the evidence). 568 F.2d at 332. The determination of whether or not a prima facie claim of double jeopardy has been shown and, if so, rebutted by a preponderance of the evidence is best made by the court and not by the jury. The likelihood of compelling the defendant to make possibly incriminating statements to the jury about the earlier offense in his defense to the subsequent charge or of prejudicing the jurors against the defendant by virtue of their hearing about the charge and evidence in the previous case is thus eliminated.

Although the government may not be forced to reveal to the defendant any materials or information not otherwise available through discovery or other means, it might choose to submit such material to the District Court for *in camera* inspection and might thus carry its burden of persuasion.

Even if the government does carry its burden of persuasion and the defendant's motion to dismiss is denied, the District Court may later vacate its finding of no prior jeopardy as the evidence develops at trial if the defendant renews his motion and the evidence shows that there was, in fact, prior jeopardy. The ruling by the District Court on the pretrial motion merely decides whether or not, upon the evidence *then before the court*, double jeopardy appears. On an *Abney* appeal, the correctness of that ruling, alone, will be reviewed. Neither the District Court's nor the Circuit Court's pretrial decision will be binding as res judicata, law of

the case, collateral estoppel, or any other theoretical bar as to the double jeopardy issue in the case.

III. Stricklin's Double Jeopardy Claim

We turn now to the application of the procedural rules heretofore discussed to the facts in this case. Stricklin claims that the Double Jeopardy Clause of the Fifth Amendment bars the government's attempt to prosecute him in Texas on the conspiracies charged because the alleged conspiracies were encompassed in conspiracies alleged in two previous indictments pursuant to which he was subjected to jeopardy. Close analysis of this case reveals that we are actually confronted with an unusual and complex blend of double jeopardy and speedy trial problems.

A. The Tennesee Indictment

We begin our analysis with the observation that the Tennessee indictment's dismissal with prejudice for violation of Stricklin's speedy trial rights under the Sixth Amendment did not invoke jeopardy. *United States v. Marion*, 404 U.S. 307, 312, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). A motion to dismiss before trial for lack of speedy prosecution has

> nothing to do with guilt or innocence or the truth of the allegations in the indictment but [is], rather, a plea in the nature of confession and avoidance, that is, where the defendant

> does not deny that he has committed the acts alieged and the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as . . . the denial of a speedy trial.

404 U.S. at 312, 92 S.Ct. at 459. For a jury trial, jeopardy attaches when the jury is empaneled and sworn. For a bench trial, jeopardy attaches when the judge begins to receive evidence. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977); *Illinois v. Somerville*, 410 U.S. 458, 471, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). This Court noted in *United States v. Pitts*, 569 F.2d 343, 347 n. 5 (5th Cir.), *cert. denied*, 436 U.S. 959, 98 S.Ct. 3076, 57 L.Ed.2d 1125 (1978), that "[s]ufficient constitutional and statutory measures protect defendants in cases that might be tainted by an overzealous prosecutor abusing the rules marking the attachment of jeopardy to make abandonment of those rules unnecessary" where a previous indictment had been dismissed at the government's request. In this case, Stricklin's Sixth Amendment constitutional right to a speedy trial protects him from the government's again bringing those charges contained in the Tennessee indictment which was dismissed with prejudice on constitutional speedy trial grounds. Stricklin cannot be reindicted for the same crime because Sixth Amendment speedy trial rights could, otherwise, be easily bypassed. *Mann v. United States*, 113 U.S.App.D.C. 27,

30, 304 F.2d 394, 397, *cert. denied*, 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed.2d 127 (1972). *Accord, United States v. Simmons*, 536 F.2d 827, 833 (9th Cir.), *cert. denied*, 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d 130 (1976); *United States v. Correia*, 531 F.2d 1095, 1097 (1st Cir. 1976); *United States v. Clay*, 481 F.2d 133, 135 (7th Cir.), *cert. denied*, 414 U.S. 1009, 97 S.Ct. 371, 38 L.Ed.2d 247 (1973); *United States v. Beidler*, 417 F.Supp. 608, 616 (M.D.Fla. 1976).

While Stricklin cannot be reindicted for the same conspiracy for which he was charged in Tennessee indictment, the government is not barred from using the underlying facts in that offense as the basis for a charge that he committed a different offense. As we noted in *United States v. Rivero*, 532 F.2d 450, 457 (5th Cir. 1976), "the dismissal of the indictment, with or without prejudice, does not amount to the determination of any of the intrinsic underlying facts. What, and all, it stands for, is that the defendant cannot be reindicted or tried for that same charge."

We do not reach the question of whether the Texas indictment is barred under the Sixth Amendment by virtue of charging Stricklin with the same crime as charged in the dismissed Tennessee indictment. While *Abney* establishes that the denial of a double jeopardy claim is a final and appealable decision within the meaning of 28 U.S.C. §1291, there is no comparable jurisdictional basis on which to exercise pretrial review of an indictment which is potentially barred by Sixth Amendment speedy trial considerations. The Supreme

Court recently held in *United States v. MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978), that a defendant may not, *before* trial, appeal a federal district court's order denying his motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial. *Accord, United States v. Bailey*, 512 F.2d 833 (5th Cir.), *cert. dismissed*, 423 U.S. 1039, 96 S.Ct. 578, 46 L.Ed.2d 415 (1975). Stricklin's situation is different from that found in *MacDonald* since the possible violation of his rights lies in his being reindicted on the same charges which were the subject of an indictment already dismissed on speedy trial ground rather than in his being brought to trial on the first indictment, as in *MacDonald*. The basic consideration in both cases, however, is whether the defendants' speedy trial rights will be violated by the impending prosecutions, and for us to expand appellate jurisdiction to include the situation where the dismissed indictment is claimed to bar a subsequent indictment on speedy trial grounds would be unwarranted.

In any event, the argument is not properly before us because Stricklin incorrectly bases his argument regarding the Tennessee indictment on double jeopardy grounds rather than on speedy trial grounds. Our discussion of the speedy trial aspects of this case is a necessary part of our rejection of Stricklin's double jeopardy claim concerning the Tennessee indictment. We anticipate that the defendant will take heed on remand and make the proper argument; the District Court will then, of course, make the proper analysis.

B. The New Mexico Indictment

There is no doubt that jeopardy attached in the trial on the New Mexico indictment; Stricklin was convicted on charges of possession with intent to distribute marijuana and conspiracy to possess with intent to distribute marijuana. We must now discern whether or not Stricklin has brought forth a prima facie nonfrivolous claim that the government seeks to charge him again for the same crime in the Texas indictment.

In the double jeopardy context, the position of the parties is reversed from that usually taken in trials of conspiracy cases. In the latter, it is usually the government's position that all similar conduct proven is part of one far-reaching conspiracy. The defendant generally asserts that, if conspiracy be shown at all, his activity was separate from, and not connected with, the conspiracy charged.

In the dispute over double jeopardy, however, it is the defendant who asserts that the earlier indictment was sufficiently broad to encompass all of his conduct, and the government asserts the narrow, limited scope of its earlier indictment. Here, Stricklin insists that the New Mexico indictment covered certain conduct for which he is now indicted in Texas, and the government argues that the New Mexico indictment was limited in scope to the single transaction recited therein. This conflict sufficiently demonstrates the need for care and definition in the drawing of indictments in conspiracy cases.

At his double jeopardy hearing, Stricklin introduced material obtained in a Nevada trial under the Jenck's Act. This evidence tends to show that Stricklin entered into a conspiracy with Don Johnson and Tim Melancon, two of the conspirators named in the original Texas indictment, to import marijuana into the United States after the Tennessee conspiracy was terminated.[2] It appears from the evidence in the record that two loads of marijuana were flown to New Mexico from the Republic of Mexico by Don Johnson and Tim Melancon. The first load was apparently the load that was involved in those overt acts taking place in March and November of 1973, near Magdalena, New Mexico, and mentioned in both the conspiracy to import count and the conspiracy to possess with intent to distribute count of the original Texas indictment. The second load was seized in New Mexico on August 18, 1974, in Stricklin's possession; this incident served as the basis of the New Mexico indictment and conviction. With regard to that portion of the original Texas indictment which Stricklin asserts refers to the New Mexico conspiracy to possess with intent to distribute for which he was previously convicted, Stricklin's burden of coming forth with a prima facie nonfrivolous double jeopardy claim is met. We pointed out in *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978), that "the relevant question [in narcotics conspiracy cases] is . . .

2 Stricklin asserts that the New Mexico conspiracy was a different conspiracy than the one with which he was charged in Tennessee. Even if the New Mexico conspiracy had been a continuation of the Tennessee conspiracy, further operation of the "old" conspiracy after being charged with that crime becomes a new offense for purposes of a double jeopardy claim.

whether the particular transactions alleged in the indictments were within a larger, unified conspiracy." The evidence which Stricklin proffers satisfies

> the usual tests for determining the existence of a unified conspiracy — the participants shared a continuing, common goal of [importing] marijuana for profit; the operations of the conspiracy followed an unbroken and repetitive pattern; and the cast of conspirators remained much the same.

576 F.2d at 1151. As we indicated in *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978),

> [o]ur examination of the record focuses upon these elements: (1) time, (2) persons acting as coconspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Our consideration of the foregoing factors leads to the conclusion that Stricklin makes a prima facie showing that the events charged in the original Texas indictment relating to the Magdalena episode and the events charged in the New Mexico indictment were part of a single agreement.

The government's obtaining a new indictment subsequent to the hearing, which deletes all references to Don Johnson, Tim Melancon, and the Magdalena, New Mexico, episode is of no consequence to our finding, for, as we pointed out earlier, the original indictment was never dismissed. In fact, the government's revision of the conspiracy counts may not bode well for their assertion that the conspiracies for which they seek to prosecute in the Texas indictment are clearly distinct from the conspiracies for which Stricklin has previously been indicted.

Stricklin's prima facie showing of former jeopardy goes only to the conspiracy count for possession with intent to distribute and not to the conspiracy count for importation. The government may constitutionally abetting the unlawful possession of marijuana and for importat-ion. The government may constitutionally charge a defendant with conspiracy to import, as well as with conspiracy to possess with intent to distribute, despite the existence of only one conspiratorial agreement. *United States v. Marable*, 578 F.2d at 154 n. 1; *United States v. Ruigomez*, 576 F.2d at 1151 n. 2; *United States v. Dyar*, 574 F.2d 1385, 1389-90 (5th Cir. 1978); *United States v. Houltin*, 525 F.2d 943, 950-51 (5th Cir.), *vacated on other grounds, sub nom. Croucher v. United States*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1976). The Double Jeopardy Clause imposes few limits on the legislative power to define offenses, and Congress may choose to punish two aspects of conspiratorial behavior without violating the Fifth Amendment. *See United States v.*

Sanabria, 437 U.S. 54, 70 n. 24 and accompanying text, 98 S.Ct. 2170, 2181-82, 57 L.Ed.2d 43 (1978).

Similarly, each of the three substantive counts for aiding and abetting and the substantive count for importation allege separate offenses. *See Iannelli v. United States*, 420 U.S. 770, 777 n. 10, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); *Pereira v. United States*, 347 U.S. 1, 11-12, 74 S.Ct. 358, 98 L.Ed. 435 (1954). Stricklin was convicted under the New Mexico indictment of possessing marijuana with intent to distribute on or about August 18, 1974. The possession offenses which he is charged in the Texas indictment with having aided and abetted took place on June 22, 1972; July 5, 1972; and July 18, 1972. The importation offense is alleged to have occurred on July 18, 1972. Clearly, the conviction for the substantive offense in the New Mexico indictment did not constitute prior jeopardy for the substantive offenses charged in the Texas indictment.[3]

Stricklin's final argument is that the Texas indictment's continuing criminal enterprise charge under 21 U.S.C. §824[4] is barred by the Double Jeopardy

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3 A defendant could successfully argue double jeopardy where two separate substantive offenses are involved if a plea bargain on the prior indictment led to dismissal of the offense.

4 A person engages in a continuing criminal enterprise, as defined in 21 U.S.C. §848(b)(2), if he violates the Drug Act in a continuing series of such violations.

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

Clause as interpreted in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), and *Brown v Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). *Jeffers* and *Brown* deal with the Double Jeopardy Clause in the context of greater and lesser included offenses. *Jeffers* is particularly pertinent to this case because the two offenses involved there were a conspiracy to distribute heroin and cocaine in violation of 21 U.S.C. §846 and a continuing criminal enterprise to violate the drug laws in violation of 21 U.S.C. §848. Although the facts in *Jeffers* made it unnecessary to settle definitively the issue of whether §846 is a lesser included offense of §848, 432 U.S. at 152-53 n. 20, 97 S.Ct. 2207, the Court's discussion of the issue indicates that the question would be answered affirmatively because §848 requires proof of an agreement among the persons involved in the continuing criminal enterprise and thus requires proof of every fact necessary to show a violation under §848 as well as proof of several additional elements. *Id.* at 147-54, 97 S.Ct. 2207. *See also Id.* at 160 n. 7, 97 S.Ct. 2207 (Stevens, J., concurring in part). Furthermore, it is our conclusion that §846 is a lesser included offense of §848 where the agreement and transactions involved in the two cases are the same. A double jeopardy defense will lie where the government has previously prosecuted a defendant under either §846 or §848 and then seeks to prose-

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(B) from which such person obtains substantial income or resources.

United States v. Bolts, 558 F.2d 316, 320 (5th Cir.), *cert. denied, sub nom. Hicks v. United States*, 434 U.S. 930, 98 S.Ct. 417, 54 L.Ed.2d 290 (1977).

cute him again on the basis of the same criminal agreement under the other statute. "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 432 U.S. at 169, 97 S.Ct. at 2227. Even if the defendant shows that the conspiracy for which he was prosecuted under §846 is the same conspiracy which serves as an element of his §848 prosecution, the double jeopardy inquiry does not necessarily end there.

> An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. *See Diaz v. United States*, 223 U.S. 442, 448-449 [32 S.Ct. 250, 56 L.Ed. 500] (1912), *Ashe v. Swenson, supra*, [397] at [436] 453 n. 7 [90 S.Ct. 1189, 25 L.Ed.2d 469] (Brennan, J. concurring).

Id. at 169 n. 7, 97 S.Ct. at 2227.

Our application of *Jeffers* and *Brown* to the facts in this case begins with determining whether or not Stricklin has made a prima facie nonfrivolous showing that the agreement and transactions which served as the basis for his New Mexico §846 conspiracy conviction are the same as those involved in the continuing criminal enterprise charge in the Texas indictment. The con-

tinuing criminal enterprise count alleges that all of the other violations alleged in the indictment were a part of a continuing series of violations which were conducted in violation of §848. Hence, the importation and aiding and abetting offenses which do not violate the Double Jeopardy Clause, as well as the possession conspiracy offense which at least in part may violate double jeopardy protection, serve as the basis of the continuing criminal enterprise charge. Stricklin has thus made out a prima facie case that the possession conspiracy and transactions for which he was convicted in New Mexico and which are alluded to in the Magdalena portions of the original Texas indictment may not be used to show the "in concert" element of the §848 offense.[5] Since Stricklin has not been subjected to prior jeopardy for the importation conspiracy offense, however, the inclusion of that agreement as part of the foundation of the §848 charge is not violative of the Fifth Amendment's double jeopardy protection. The attachment of jeopardy to one conspiracy prosecution under §846 does not insulate a defendant from prosecution for conducting a continuing criminal enterprise in violation of §848 if the government has evidence of a separate conspiracy with which to satisfy the "in concert" element of §848. Just as a defendant may be involved in more than one conspiracy over a period of

5 The government may, in accord with the exceptions referred to in *Brown v. Ohio*, rebut this presumption of a limited double jeopardy violation in the continuing criminal enterprise prosecution if it is shown on remand that the additional facts necessary to sustain the §848 charge had not occurred at the time of the New Mexico indictment or had not been discovered despite the exercise of due diligence.

time, he might also be the conductor of more than one continuing criminal enterprise.

C. The Consequences of Stricklin's Nonfrivolous Double Jeopardy Claim

We have found that Stricklin brought forth a nonfrivolous prima facie claim of double jeopardy with regard to at least that part of the possession conspiracy count in the original Texas indictment relating to the Magdalena episode with regard to that portion of the continuing criminal enterprise charge which refers to the Magdalena episode and agreement as evidence of the "in concert" element of the crime. We realize that neither the District Court, the government, nor the defendant was aware at the time of the double jeopardy hearing that the burden of proof to show there was no former jeopardy is on the government once the defendant has made a nonfrivolous showing of double jeopardy. The inference that the burden of persuasion in such a situation remains on the defendant could be drawn from earlier Fifth Circuit cases. *See United States v. Parker*, 582 F.2d 953, 954 n. 2 (5th Cir. 1978), *citing Rothaus v. United States*, 319 F.2d 528, 529 (5th Cir. 1963) *and Reid v. United States*, 177 F.2d 743, 745 (5th Cir. 1949); *United States v. Inmon*, 568 F.2d 326, 331 (3d Cir. 1977). *Parker* and *Inmon* recognized, however, that *Rothaus* and *Reid*, on which the inference is based, were decided before *Abney*. As such, they are not binding authority on the issue of where the burden of persuasion lies in an appealable pretrial determination of a double jeop-

ardy claim. *Abney's* requirement that the double jeopardy issue be resolved *before* trial demands that new considerations become controlling and the burden is thus shifted. The records were fully developed when *post*-trial appeals of double jeopardy claims were the rule prior to *Abney*, and the defendant could carry the burden of proving double jeopardy without unreasonable strain. To subject the defendant to that burden before the records are developed at trial, however, would be unreasonable, especially when the government has exclusive access to some of the possibly determinative materials at that time. For that reason, as well as the others discussed in part II of this opinion, we assign the burden of persuasion in a pre-trial double jeopardy hearing to the government upon the defendant's making a prima facie showing of prior jeopardy. However, because the parties as well as the District Court in this case were not apprised of the government's burden prior to our holding today,[6] we remand for another hearing on those charges which were shown by the defendant to be prima facie violative of the Fifth Amendment, so that the government has the opportunity to carry its burden and the District Court has the opportunity to apply the proper standards in resolving the defendant's double jeopardy claims.

Assuming that Stricklin makes the speedy trial argument referred to in part I of this opinion, the District

6 Nor did the parties or the Court have the benefit of the Third Circuit's analysis in *Inmon*, for that case was decided on November 28, 1977, some three months after Stricklin's pretrial hearing.

Court will also be faced on remand with reevaluation of the charges in the Tennessee indictment as compared with those in the Texas indictment. The District Court's task on remand, then, is to examine the Tennessee and New Mexico indictments and determine whether or not, in the trial on either one, he, as the presiding trial judge, would have permitted the prosecution to prove the matters now alleged in the Texas indictment. If he would have admitted evidence of those allegations, then the previous indictments bar the offending charges in the Texas indictment. This approach is in accord with the "same evidence" test of whether proof of the matter set out in a second indictment is admissible as evidence under the first indictment and, if it is, whether a conviction would have been properly sustained on such evidence. *See United States v. Marable*, 578 F.2d at 153. We recognized in *Marable* that the essence of a double jeopardy determination in a conspiracy case is whether there was more than one agreement, *i.d.*, but continued use of the "same evidence" test in cases such as this one may be valuable in reaching that determination.

AFFIRMED in part; REVERSED in part; AND REMANDED.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
June 22, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-3072 — U.S.A. v. JACK MOODY STRICKLIN, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ Sally Hayward
Deputy Clerk

APPENDIX "D"

AFFIDAVIT OF PETITIONER

THE STATE OF TEXAS)

COUNTY OF EL PASO)

BEFORE ME, the undersigned authority, a Notary Public in and for said county and state, on this day personally appeared JACK MOODY STRICKLIN, who, being by me first duly sworn, upon his oath deposed and stated;

"My name is JACK MOODY STRICKLIN, and I reside in El Paso, Texas. I am the sole Defendant in cause no. Ep-77-CR-160 now pending in the Western District of Texas, El Paso Division, and I was the Appellant in cause no. 77-3072 before the United States Court of Appeals for the Fifth Circuit.

My retained Counsel in these causes was the late LEE A. CHAGRA. Unfortunately, Mr. CHAGRA was killed during my appeal. His brother, JOE CHAGRA, assumed responsibility for my appeal from that point onward. I depended upon him to prosecute my appeal. It was my understanding that if we were not successful in the Fifth Circuit, that he would file a Petition for Certiorari to the United

States Supreme Court. Within a few days of the denial of my motion for rehearing en banc, Mr. CHAGRA again promised me that we would file a Petition for Certiorari. I relied on him to do exactly that. When he informed me on July 30, 1979 that there was a thirty-day limitation and that he had failed to file a Petition within that period, I discharged him as Counsel. I immediately retained other Counsel, the firm of JOSEPH (SIB) ABRAHAM, JR., 505 Caples Building, El Paso, Texas 79901, on August 3, 1979, and directed them to file a Petition immediately."

FURTHER AFFIANT SAYETH NOT.

/s/ Jack Moody Stricklin, Jr.
JACK MOODY STRICKLIN, JR.,
Affiant

SWORN TO AND SUBSCRIBED TO BEFORE ME, by the said JACK MOODY STRICKLIN, JR. on this, the 15th day of August, 1979, to certify which, witness my hand and seal of office.

/s/ Nancy C. Coryell
NOTARY PUBLIC, in and for
El Paso County, Texas

My Commission Expires:

March 27, 1981
(SEAL)

APPENDIX "E"

AFFIDAVIT OF FORMER COUNSEL

THE STATE OF TEXAS)

COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, a Notary Public in and for said county and state, on this day personally appeared JOSEPH CHAGRA, who, being by me first duly sworn, upon his oath deposed and stated;

"My name is JOSEPH CHAGRA, I reside in El Paso, Texas, and I am a practicing attorney licensed to practice in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas.

JACK MOODY STRICKLIN was a client of my brother, the late LEE A. CHAGRA. LEE CHAGRA was murdered on December 23, 1978, during the pendency of Mr. STRICKLIN's appeal. I assumed responsibility for Mr. STRICKLIN's appeal at that time. However, my other brother, JIMMY CHAGRA, was subsequently indicted and, the combination of the two events, along with the family and legal problems they entailed, have prevented me from discharging my responsibility to JACK MOODY STRICKLIN as his lawyer.

Specifically, I promised JACK MOODY STRICKLIN that I would prepare and file a Petition for Certiorari in the United States Supreme Court. I did not tell him about the time limitation involved, but simply that I would file the Petition. Because of my preoccupation with my brother's trial which was then pending, I neglected to prepare and file the Petition. Indeed, I was so preoccupied that I failed to notice that the time had passed until July 27, 1979. I informed Mr. STRICKLIN of my lapse on July 30, 1979. He discharged me as Counsel on August 3, 1979.

FURTHER AFFIANT SAYETH NOT.

/s/ Joseph Chagra
JOSEPH CHAGRA, Affiant

SWORN TO AND SUBSCRIBED TO BEFORE ME, by the said JOSEPH CHAGRA, on this, the 3rd day of August, 1979, to certify which, witness my hand and seal of office.

/s/ David H. Reynolds
NOTARY PUBLIC in and for
Travis County, Texas

(SEAL)

My Commission Expires:
May, 1981

APPENDIX "F"

AFFIDAVIT OF PRESENT COUNSEL

THE STATE OF TEXAS)

COUNTY OF EL PASO)

BEFORE ME, the undersigned authority, a Notary Public in and for said county and state, on this day personally appeared CHARLES LOUIS ROBERTS, who, being by me first duly sworn, upon his oath deposed and stated:

"My name is CHARLES LOUIS ROBERTS, and I am an Associate in the firm of JOSEPH (SIB) ABRAHAM, JR., 505 Caples Building, El Paso, Texas 79901.

On August 3rd, 1979, JACK MOODY STRICKLIN informed us that he had discharged his previous Counsel, JOSEPH CHAGRA, and that he wished to retain us to prepare an out-of-time Petition for Certiorari to the United States Supreme Court. We had not participated in this cause in any manner or at any level and were thus completely unfamiliar with the facts and legal issues. After locating and reading the record, we composed and prepared the preceeding Petition within eight working days and transmitted it by Continental Airlines to our print-

er in New Orleans, Louisiana. I am familiar with the facts contained in the foregoing Affidavits of JOSEPH CHAGRA and JACK MOODY STRICKLIN, and to the best of my knowledge they are true and correct.

FURTHER AFFIANT SAYETH NOT.

CHARLES LOUIS ROBERTS,
Affiant

SWORN TO AND SUBSCRIBED TO BEFORE ME, by the said CHARLES LOUIS ROBERTS on this, the 15th day of August, 1979, to certify which, witness my hand and seal of office.

/s/ Karen Jeffery
NOTARY PUBLIC, in and for
El Paso County, Texas

My Commission Expires:

March 27, 1981
(SEAL)

No. 79-307

In the Supreme Court of the United States

OCTOBER TERM, 1979

JACK MOODY STRICKLIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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WADE S. LIVINGSTON
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Washington, D.C. 20530

In the Supreme Court of the United States

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No. 79-307

JACK MOODY STRICKLIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-35a) is reported at 591 F. 2d 1112. The memorandum order of the district court (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1979. A petition for rehearing was denied on June 22, 1979 (Pet. App. 36a). The petition for a writ of certiorari was filed on August 25, 1979, and is therefore out of time under Rule 22(2) of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner has a right to a pretrial appeal from an order denying his

motion to dismiss certain counts of an indictment on the ground that they charge the same offenses as an indictment that had earlier been dismissed in another district on speedy trial grounds.

STATEMENT

1. In August 1973, an indictment was returned against petitioner in the Middle District of Tennessee. It charged him with possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a), and with conspiracy to commit that offense, in violation of 21 U.S.C. 846.[1] The indictment further charged that the conspiracy continued from December 1970 to the date of the return of the indictment. The bill of particulars stated that overt acts in furtherance of the conspiracy occured in Tennessee, Georgia, Canada, Kentucky, Florida, Arizona and El Paso, Texas (Pet. App. 9a-10a). On March 18, 1975, the district court dismissed this indictment with prejudice for failure to grant petitioner a speedy trial (Pet. App. 13a).

In August 1974, a second indictment was returned by a grand jury in the District of New Mexico. This indictment charged petitioner with possession of marijuana with intent to distribute and conspiracy to commit that offense in New Mexico on or about August 18, 1974, in violation of 21 U.S.C. 841 and 18 U.S.C. 2 (Pet. App. 10a). Petitioner was tried and convicted on both counts of this indictment on March 14, 1975, and sentenced to five years' imprisonment (Pet. App. 13a).[2]

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[1]Acts occurring prior to May 1, 1971, were alleged to violate 21 U.S.C. 176(a) (repealed), the predecessor of the current 21 U.S.C. 841 and 846.

[2]The Tenth Circuit affirmed this conviction, 534 F. 2d 1386, cert. denied, 429 U.S. 831 (1976).

The Texas indictment that is involved in this case was returned by a grand jury in the Western District of Texas in June 1977. It charged petitioner with: (1) importing marijuana in violation of 21 U.S.C. 952(a) and 960(a)(1); (2) conspiring to import marijuana in violation of 21 U.S.C. 952(a) and 963; (3) aiding and abetting two individuals on three occasions in their unlawful possession of marijuana in violation of 21 U.S.C. 841(a), thus violating 18 U.S.C. 2; (4) conspiring to possess marijuana with intent to distribute in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846; and (5) conducting a continuing criminal enterprise in illicit drugs in violation of 21 U.S.C. 848 (Pet. App. 11a).

Both the importation conspiracy and the possession conspiracy in this indictment were alleged to have continued from September 1971 to June 1976 in Tennessee, Georgia, New Mexico, Mexico and the Western District of Texas. The indictment listed 14 overt acts in furtherance of the importation conspiracy and repeated 12 of these acts as the overt acts in furtherance of the possession conspiracy. These overt acts were alleged to have occurred between September 1971 and November 1973 in New Mexico, Mexico and the Western District of Texas. The criminal enterprise was alleged to have operated from June 1972 to June 1976 in Mexico, New Mexico, Georgia, Minnesota, North Carolina, the District of Columbia, and the Western District of Texas (Pet. App. 11a-12a).

2. In August 1977, petitioner moved to dismiss the Texas indictment on the ground that he had previously been placed in jeopardy on the charges by the New Mexico and Tennessee indictments. The district court held a pretrial double jeopardy hearing on August 31, 1977 (Pet. App. 14a). On September 15, 1977, a superseding indictment was filed that charged essentially

the same offenses as the first indictment but omitted five co-conspirators and the reference to Tennessee as one location for the conspiracies. Five overt acts were also omitted from each of the conspiracy counts, shortening the period of the overt acts in furtherance of the importation conspiracy to December 1971 through November 1972 and the period of the overt acts in furtherance of the possession conspiracy to December 1971 through October 1972 (Pet. App. 12a-14a).

In September 1977, the district court entered an order (Pet. App. 1a-7a) denying petitioner's motion to dismiss the Texas indictment on double jeopardy grounds. The court ruled (Pet. App. 1a) that the substantive counts of importing marijuana and aiding and abetting the possession of marijuana with intent to distribute were not barred because they were based on distinct acts occurring in the Western District of Texas. The district court also ruled (Pet. App. 2a) that the conspiracies alleged in the superseding indictment were distinct and separate from the ones alleged in the Tennessee and New Mexico indictments and that the Tennessee indictment had not placed petitioner in jeopardy because it was dismissed before jeopardy had attached (Pet. App. 2a). Finally, the court found (Pet. App. 3a-4a) that the government, despite due diligence, had not discovered that petitioner could have been charged with conducting a criminal enterprise at the time the Tennessee and New Mexico indictments were filed. Consequently, the court ruled that the previous indictments did not bar a criminal enterprise prosecution, citing *Jeffers* v. *United States*, 432 U.S. 137 (1977).

3. Petitioner appealed the district court's pretrial denial of his motion to dismiss on double jeopardy grounds. The court of appeals held that the conviction under the New

Mexico indictment did not bar prosecution for the substantive counts of importation and aiding and abetting the possession of marijuana with intent to distribute because those counts "allege separate offenses" (Pet. App. 29a). The court further held (Pet. App. 28a) that the Texas indictment charging conspiracy to import marijuana was not barred because conspiracy to import and conspiracy to possess with intent to distribute (the only conspiracy charged in the New Mexico indictment) are separate offenses for double jeopardy purposes. The court did find, however, that petitioner had made a non-frivolous prima facie claim of double jeopardy, based on the New Mexico indictment, with respect to certain portions of the possession conspiracy and criminal enterprise charges (Pet. App. 27a, 32a-33a). It therefore remanded the case to the district court for further proceedings at which the government would have the burden of showing that those aspects of the intended prosecution are not barred by the Double Jeopardy Clause (Pet. App. 33a-34a).

The court of appeals rejected petitioner's double jeopardy claim to the extent it was based on the Tennessee indictment, holding that the Tennessee charges had been dismissed before jeopardy had attached (Pet. App. 21a-22a). Rather, the court noted, it was petitioner's Sixth Amendment right to a speedy trial that protected him against the government once again bringing the charges contained in the Tennessee indictment. The court declined to consider the merits of this speedy trial claim for two reasons. First, it held that rejection of a speedy trial claim could not be appealed before trial, citing *United States* v. *MacDonald*, 435 U.S. 850 (1978), although the double jeopardy claim was appealable under *Abney* v. *United States*, 431 U.S. 651 (1977). Second, it ruled that the speedy trial claim was not properly before

the court because petitioner had based his argument on double jeopardy grounds; it noted that the district court on remand would consider the speedy trial claim if petitioner raised it (Pet. App. 23a-24a).

ARGUMENT

Petitioner contends (Pet. 16-27) that the court of appeals erred in determining that it could not entertain an interlocutory appeal of the district court's decision not to dismiss the indictment on the ground of congruence with the Tennessee indictment that had been dismissed on speedy trial grounds.

1. This contention is not ripe for review. First, as the court of appeals pointed out (Pet. App. 24a), the speedy trial claim was not made in the district court and could not have been considered by the court of appeals. The speedy trial claim will now be considered for the first time by the district court on remand. The district court may find that the challenged portions of the Texas indictment should be dismissed on speedy trial grounds, in which case petitioner would have no reason to appeal.[3] It is inappropriate for this Court (or the court of appeals) to review petitioner's claim at this stage where the speedy trial issue has yet to be considered in the district court. See generally *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

2. Moreover, the court of appeals was correct in holding (Pet. App. 23a-24a) that an appeal from a failure

[3]The remedy provided by the remand is not illusory. The court of appeals clearly instructed the district court that petitioner's "Sixth Amendment constitutional right to a speedy trial protects him from the government's again bringing those charges contained in the Tennessee indictment which was dismissed with prejudice on constitutional speedy trial grounds" (Pet. App. 22a).

to dismiss an indictment on speedy trial grounds may not be taken before trial. 28 U.S.C. 1291 provides that only final orders may be appealed. *Abney* v. *United States*, 431 U.S. 651 (1977), established that a denial of a double jeopardy claim could be appealed even though such a denial lacks "traditional finality" in that it does not terminate the proceedings. However, in *United States* v. *MacDonald*, 435 U.S. 850 (1977), the Court declined to create a similar exception for speedy trial claims and held that such claims could not be appealed until after trial. The Court noted that "most speedy trial claims * * * are best considered only after the relevant facts have been developed at trial." 435 U.S. at 858.

Although this case differs from *MacDonald* in that part of the speedy trial inquiry would consider factors similar to those considered in a double jeopardy inquiry, other speedy trial issues that are best considered after trial might be raised. In any event, the mere fact that the inquiry is similar to a double jeopardy inquiry does not warrant creating an exception to the normal rule of finality for petitioner's claim. The *Abney* exception was based on "the special considerations permeating [double jeopardy] claims." 431 U.S. at 663. One of the most critical of these "special considerations" is the purpose of the Double Jeopardy Clause to protect defendants from being tried twice, a protection that would be lost if pretrial appeal were not possible. 431 U.S. at 660-662. No similar consideration is involved here. If petitioner is precluded from a pretrial appeal of his speedy trial claim, he will not be tried twice for the same offense because he was never placed in jeopardy on the Tennessee indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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